

MEMORANDUM

To: Lee Juan Tyler, Shoshone-Bannock Tribes, Vice-Chairman

From: Scott Hauser, Upper Snake River Tribes Foundation, Environmental Program Director and Acting Executive Director

Date: June 2, 2015

Re: Update on the Idaho Fish Consumption Process

Idaho's (ID) draft rule has been approved by the ID Board of Environmental Quality and has been approved by the 2016 ID State Legislature. The Upper Snake River Tribes (USRT) Foundation and Shoshone-Bannock Tribes (SBT) submitted numerous comments to the Idaho Department of Environmental Quality throughout the process (October 2012 – December 2015) and testified in front of the ID Board of Environmental Quality in December 2015. Additionally, the SBT testified in front of the ID Legislature during the 2016 session. Finally, staff from USRT attended every rulemaking meeting that occurred from October 2012 – December 2015, participated in two radio shows on the issue providing the tribal perspective, and wrote opinion pieces on the issue that were published in newspapers throughout ID.

On July 28, 2015, EPA contractors released the draft final copy of the Idaho fish consumption survey of the Shoshone-Bannock and Nez Perce Tribes that was conducted in 2014-15. The survey showed that tribal consumption for the Nez Perce Tribe and SBT are much higher at the 95th percentile than what Idaho is proposing:

Nez Perce Tribe

Table S1. Mean, median and selected percentiles of FFQ and NCI method FCRs (g/day, raw weight, edible portion); consumers only. Estimates are weighted.

Species Group*	No. of Consumers	Mean	Percentiles		
			50%	90%	95%
Group 1 - FFQ	451	123.4	70.5	270.1	437.4
Group 1 - NCI Method	451	75.0	49.5	173.2	232.1
Group 2 - FFQ	446	104.0	61.3	231.4	327.9
Group 2 - NCI Method	446	66.5	36.0	159.4	233.9

Group 1 includes all finfish and shellfish. Group 2 includes near coastal, estuarine, freshwater, and anadromous finfish and shellfish.

Shoshone-Bannock Tribes

Table S1. Mean, median and selected percentiles of FFQ and NCI method FCRs (g/day, raw weight, edible portion); consumers only. Estimates are weighted.

Species Group*	No. of Consumers	Mean	Percentiles		
			50%	90%	95%
Group 1 - FFQ	226	158.5	74.6	392.5	603.4
Group 1 - NCI Method	226	34.9	14.9	94.5	140.9
Group 2 - FFQ	225	110.7	48.5	265.6	427.1
Group 2 - NCI Method	225	18.6	6.5	48.9	80.0

*Group 1 includes all finfish and shellfish. Group 2 includes near coastal, estuarine, freshwater, and anadromous finfish and shellfish.

On March 25, 2016, ID finalized its water quality standard rule using a fish consumption rate of 66 grams per day, which is based on the mean consumption rate of Nez Perce tribal members of “near coastal, estuarine, freshwater, and anadromous” fish from the 2015 Environmental Protection Agency (EPA) survey (see Nez Perce table above). The rule uses a cancer risk rate of 1 in 100,000—ten times less stringent than Oregon’s (and Washington’s proposed) rate of 1 in 1,000,000. The ID proposed rule’s fish consumption rate is also 265% less than Oregon’s fish consumption rate (175 grams/day) and the one being proposed in Washington, which is also 175 grams/day. The rule uses EPA’s 2015 updated recommendations for Relative Source Contribution, Bioaccumulation Factors, and Toxicity Factors but overall is weaker because of the inadequate fish consumption rate and cancer risk level.

Affiliated Tribes of Northwest Indians Resolution #15-51 “Opposing Idaho’s Proposed Water Quality Standards and Fish Consumption Rate” was passed at the 2015 Fall Convention. The resolution was brought forth by the SBT and introduced by SBT Vice-Chairman Lee Juan Tyler (the resolution is attached). The resolution was then taken to the 2015 National Congress of American Indians Annual Convention (#SD-15-034), where it passed (the resolution is attached).

The tribes of ID and the EPA have been coordinating throughout the process via face-to-face meetings and at minimum one conference call a month. In early February 2016, EPA staff (Mary Lou Soscia, Lon Kissinger, and Lisa Macchio) informed the ID tribes that if the EPA were to disapprove ID’s water quality standards and fish consumption rate they would likely use tribal treaty rights as a means of disapproval. EPA’s position is that ID standards would not protect tribal fishing rights. While the tribes agree that ID’s proposed standards will not protect tribal fishing rights they are not in agreement with the EPA that tribal treaty rights should be used as a means of disapproval. The tribes, as they should, have very significant concerns about putting their hard-earned and inherent rights on trial. **TRIBAL TREATY RIGHTS SHOULD NOT BE PUT ON TRIAL AND EPA HAS NO RIGHT TO DO SO!** The tribes of ID meet with EPA Region 10 Administrator Dennis McLerran, along with additional EPA staff, in Boise, ID, on May 3, 2016, and expressed their significant concerns about the use of tribal treaty rights to disapprove ID’s proposed standards and fish consumption rate.

There are several reasons that EPA could use to disapprove ID’s proposed water quality standards and fish consumption rate instead of tribal treaties. They include:

- Downstream water protection – ID’s standard is not protective of downstream waters in Oregon and Washington
- Antidegradation – ID’s standard will cause degradation in water bodies
- Designated use – ID’s standard will violate waters that are designated as fishable
- Disproportionate impact on tribes – ID’s standard protects tribal members at the 50th percentile, but the white population at the 95th percentile. Tribal members should be the “target” population and protected at the 95th percentile (or greater)
- Acceptable cancer risk rate – ID has not justified setting an acceptable cancer risk rate of 1 in 100,000. Washington proposed an acceptable cancer risk rate of 1 in 100,000 and the EPA told them that it wasn’t justifiable.
- Regional consistency – Oregon has a fish consumption rate of 175 grams/day and an acceptable cancer risk rate of 1 in 100,000. Washington is proposing the same. There should be regional consistency in EPA Region 10, and at minimum, ID should have standards no less than Oregon and Washington.